IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

MICHAEL H. NORRIS
Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

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	)	
Appellant	)	
	)	
v.	)	Vet. App. 15-4534
	)	
ROBERT A. McDONALD,	)	
Secretary of Veterans Affairs	)	
	)	
Appellee	)	

ON APPEAL FROM
THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUE PRESENTED

Whether the Court should affirm the March 16, 2015, Board of Veterans' Appeals (Board or BVA) decision finding no clear and unmistakable error (CUE) in a July 1977 rating decision, where Appellant fails to demonstrate that the Board's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Michael H. Norris ("Appellant"), appeals the March 16, 2015, decision of the Board**,** which declined to reverse or revise a July 1977 rating decision denying service connection for a psychiatric disability on grounds of

CUE. (Record (R.) at 1-16). On appeal to this Court, Appellant, who is represented by counsel, seeks reversal. (Appellant's Brief (App. Br.) at 19). The Secretary disputes his contentions, and seeks affirmance.

C. Statement of Relevant Facts

Appellant enlisted with the United States Army on February 13, 1973. (R. at 37). Prior to his enlistment, he completed a report of medical history in which he denied currently having, or ever having, depression or excessive worry, nervous trouble of any sort, or treatment for a medical condition. (R. at 1146-47). An accompanying report of medical examination failed to reflect any mental health conditions, and Appellant was found qualified for enlistment and induction into the Army. (R. at 1149 (1148-49)).

Several months into his service, in April 1973, Appellant presented to the medical clinic with complaints of diarrhea that existed for two days, and "bad nerves." (R. at 1633). He asked for tranquilizers, and was prescribed valium. (*Id.*). In May 1973, he continued to experience nervousness and diarrhea. (R. at 1635-36). At that time, he disclosed that he had experienced two episodes of "nervous breakdowns" before he entered the active service, for which he was treated by a family physician. (R. at 1635). Appellant was examined by a physician's assistant, who reported that Appellant had experienced difficulty since his entry into service, describing, for example, Appellant's failing physical training in basic training. (*Id.*). Appellant told that physician's assistant that he "can't make it," and that he wanted out of the military. (*Id*.). The physician's

assistant's impression was character and behavior disorder, and the plan was to obtain a mental health consultation. (R. at 1636). The record does not reflect that a mental health consultation was immediately conducted.

In October 1973, according to a chronological record of medical care, Appellant was still experiencing diarrhea due to nervousness. (R. at 1637).[1] The doctor who examined Appellant on that occasion ordered a psychiatric evaluation. (*Id.*). Appellant was evaluated that day by a social worker of the mental hygiene clinic, who stated that Appellant had been seen at that clinic "on numerous occasions" since October 4. (R. at 1640). The social worker stated that Appellant had "related problems of confusion and anxiety centered around the duties and various tasks that are given him at his unit." (*Id.*). Appellant's anxiety, the social worker explained, was "manifested by[] confusion as to the duties he is to perform, and trouble adjusting to his job situation." (*Id*.). Appellant was returned to duty after being counseled "to help him realize his situation" and "more clearly understand his obligations in the military." (*Id*.).

Appellant was examined in December 1974 for purposes of his separation from service. (R. at 1652-53). No mental health conditions were noted at that time. (R. at 1652-53). His physical profile was assigned a "1" under profile

[1] Although the handwriting on this progress note appears to be dated October 23, 1972, the entry of that date appears immediately following an entry dated August 20, 1973. (R. at 1637). Also, Appellant had not entered the active service until February 1973. (R. at 37). Hence, the chronological record of medical care of October 23 appears to have been prepared in 1973.

category "S," indicating that Appellant had no psychological abnormalities that would have disqualified him from service.[2] (R. at 1653 (1652-53)). Appellant was discharged on December 31, 1974, for "[f]ailure to meet acceptable standards for continued military service." (R. at 37); *see also* (R. at 47).

In March 1977, Appellant filed a claim for service-connected disability compensation for a nervous condition with the Veterans Administration (VA).[3] (R. at 3089-92). When examined for that claim the following month, Appellant told a VA doctor that he noticed progressive feelings of nervousness and apprehension as early as 1968 when his father died, which was several years before Appellant entered the active service. (R. at 3073). Appellant told the doctor that he was treated in the mental health clinic while in service. (*Id*.). However, the VA doctor did not have Appellant's claims file to review, and instead relied on Appellant's description of his mental health history. (*Id*.). After summarizing his clinical observations, the VA doctor diagnosed anxiety neurosis. (*Id*.).

In July 1977, a VA regional office (RO) issued a rating decision denying service connection for a "nervous disorder." (R. at 3062-64); *see also* (R. at 1115-17). In that decision, the RO explained that Appellant's service medical

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[2] *See McKinney v. McDonald*, 28 Vet.App. 15, 19-20 (2016).

[3] The Veterans Administration was elevated to an Executive Cabinet department by act of Congress in 1988, and it was renamed "Department of Veterans Affairs." Department of Veterans Affairs Act, 100 Pub. L. 527, 102 Stat. 2635 (1988). In this brief, the Secretary will refer to both the Veterans Administration and the Department of Veterans Affairs as "VA."

records revealed that he had two episodes of a "nervous breakdown" prior to service, for which he was treated by his family physician. (R. at 3063). The RO noted that Appellant's in-service diagnosis was "character/behavior disorder," which, the RO stated, was "not a disability under the law." (*Id.*). The RO also stated that, at the time of discharge, Appellant "had no complaints nor was there shown any indication of any mental disorder." (*Id.*). The RO concluded by stating, "There is no evidence to show that [Appellant's] currently diagnosed anxiety neurosis related [sic] to the condition diagnosed in service as a character behavior disorder, and service connection is denied for anxiety." (*Id*.). In the cover letter to that rating decision, the RO explained that, in order to establish entitlement to disability compensation, the evidence had to show that the disability was incurred in or aggravated by military service. (R. at 3062). The RO also explained that service medical records showed that, prior to entering service, Appellant had had two episodes of a nervous condition, and that, at the time of discharge, there were no complaints or any indication of a nervous condition. (R. at 3062). Appellant did not appeal that decision.

Years later, in January 1999, Appellant filed a VA Form 21-526, application for compensation or pension, listing "chronic depression 1980," as the nature of his disability and when it began. (R. at 2981 (2981-84)); *see also* (R. at 2979-80). Based upon that application, the RO adjudicated a claim for non-service-connected pension, which it denied. (R. at 2957-59, 2961).

In April 2006, Appellant filed an informal claim for compensation for depression, and shortly thereafter hired an attorney to represent him in the prosecution of that claim. (R. at 2924-28, 2939-40). In August 2007, the RO granted service connection for schizoaffective disorder and anxiety disorder, and assigned a 100% rating, effective April 18, 2006. (R. at 2575-85). Appellant, through his attorney, filed a notice of disagreement (NOD) in which he expressed disagreement with the effective date of the service-connection award. (R. at 2556-61). He also argued that the RO committed CUE in its 1977 rating decision "by failing to consider or discuss the presumptions of soundness and aggravation which applied." (R. at 2557).

After a lengthy procedural posture not relevant here, in May 2014, the Board granted an earlier effective date of January 25, 1999, the date on which VA received his application for compensation or pension, for the award of service connection for schizoaffective and anxiety disorders. (R. at 1817 (1784-1817)). However, the Board found there to be no CUE in the July 1977 rating decision, and therefore declined to reverse or revise that final decision. (R. at 1785-86). Appellant appealed that decision to this Court, which resulted in the parties' filing a joint motion for partial remand (JMPR). (R. at 1762-66). In the JMPR, the parties agreed that the Board's statement of reasons or bases was deficient because it reflected a misapplication of the presumption of soundness. (R. at 1763).

On March 16, 2015, the Board again declined to revise or reverse the July 1977 rating decision on grounds of CUE. (R. at 1-26). The Board found that there was sufficient evidence before the RO in 1977 to conclude that Appellant clearly and unmistakably had a pre-existing psychiatric disorder. (R. at 20). The Board also found that, at the time of the 1977 RO decision, "reasonable minds could conclude that there was clear and unmistakable evidence that any pre-existing disability was not aggravated during service." (*Id.*). This appeal followed.

III. SUMMARY OF ARGUMENT

The Court should affirm the Board's decision because Appellant fails to demonstrate that the Board's finding that there was no CUE in the 1977 rating decision denying service connection for a psychiatric condition was arbitrary, capricious, an abuse of its discretion, or otherwise not in accordance with law. The Board plausibly found that the evidence before the RO in 1977 was sufficient to conclude that Appellant's psychiatric condition pre-existed service and was not aggravated by service, by the "clear and unmistakable evidence" standard. Appellant's reliance on the presumption of aggravation is misplaced because no mental condition was noted upon entry into active service, and therefore the presumption of aggravation was not applicable in 1977.

IV. ARGUMENT

A motion to revise or reverse a final RO decision on grounds of CUE is not a direct appeal of that decision, but instead, is a collateral attack on it. *Evans v.*

McDonald, 27 Vet.App. 180, 185 (2014). The revision of a final RO decision on the basis of CUE is an "extraordinary event." *King v. Shinseki*, 26 Vet.App. 433, 442 (2014). For the Board to find CUE in a final RO decision, the following conditions must be met. First, either the correct facts in the record were not before the adjudicator or the statutory or regulatory provisions in existence at the time were incorrectly applied. *Id*. at 439. Second, the alleged error must be "undebatable," not merely "a disagreement as to how the facts were weighed or evaluated." *Id.* Third, the commission of the alleged error must have "manifestly changed the outcome" of the decision being attacked on the basis of clear and unmistakable error at the time that decision was rendered. *Id.* Under this third criterion, the Board must determine whether, if the error had not been made, the benefit sought would have been granted. *Id.* 441.

This Court does not directly review a CUE motion, but instead, reviews the Board's decision ruling on the CUE motion. *Evans*, 27 Vet.App. at 186. When reviewing the Board's decision, the Court's review is limited to whether the Board's conclusions were arbitrary, capricious, an abuse of its discretion, or otherwise not in accordance with law. *Evans*, 27 Vet.App. at 186; 38 U.S.C. § 7261(a)(3)(A). This is a highly "deferential" standard. *Marrero v. Gober*, 14 Vet.App. 80, 81 (2000). Under this standard, there need only be a rational connection between the facts found and the choice made. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Ternus v. Brown*, 6 Vet.App. 370, 375 (1994). Because this Court cannot review

a CUE motion under the same standard by which it reviews matters on direct appeal, "there will be times when the Court arrives at a different conclusion when reviewing a motion to reverse or revise a prior, final decision than it would have had the matter been reviewed under the standards applicable on direct appeal." *Evans*, 27 Vet.App. at 186 (citation omitted). In this Court, the appellant bears the burden of demonstrating the existence of an error. *Barrett v. Shinseki*, 22 Vet.App. 457, 461 (2009). Here, the Court is reviewing the March 16, 2015, Board decision, rather than the July 1977 rating decision. Appellant fails to demonstrate that the Board's decision was arbitrary, capricious, an abuse of its discretion, or otherwise not in accordance with law.

A. The presumption of aggravation does not apply when a condition is not "noted" upon entry into service.

Appellant's CUE motion involved the 1977 RO's purported failure to consider or discuss the presumptions of soundness or aggravation. (R. at 2557). Under the presumption of soundness, as in effect in 1977 and today, veterans are presumed to have been in sound condition "when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment . . . ." 38 U.S.C. § 311 (1976); 38 U.S.C. § 1111 (2012). This presumption is rebuttable by a two-prong test. Under the first prong, there must be clear and unmistakable evidence demonstrating that the injury or disease existed before acceptance and enrollment in service. *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004).

Under the second prong, there must be clear and unmistakable evidence that the pre-existing condition was not aggravated by such service. *Id.* The government bears the burden of rebutting this presumption. *Id.*

A different statutory provision establishes the presumption of aggravation, which is not to be confused with the aggravation prong of the presumption of soundness. Under the presumption of aggravation, as in effect in 1977 and today, "[a] preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease. 38 U.S.C. § 353 (1976); *see also* 38 U.S.C. § 1153 (2012).[4] Unlike the presumption of soundness, which applies when conditions are ***not*** noted upon entry into service, the presumption of aggravation applies only when a condition ***is noted*** upon entry, and the veteran seeks compensation for aggravation of that the preexisting condition. *See McKinney*, 28 Vet.App. at 23 (explaining the difference between the presumption of soundness of § 1110 and the presumption of aggravation of § 1153); *see also Horn v. Shinseki*, 25 Vet.App. 231 (2012) (holding that, although the word "aggravation" has a common meaning in both statutes, "this linguistic overlap does not signal that the presumption of aggravation in Section 1153, with its attendant burden of proof rules, is triggered in presumption of

[4] Superseded statutes and rules are appended to this brief in compliance with this Court's Rule 28(i).

soundness cases once preexistence of the injury or disease has been established").

Appellant misunderstands the distinction between the two presumptions, and many of his arguments flow from that misunderstanding. Relying on this Court's opinion in *Joyce v. Nicholson*, Appellant argues that the RO, in 1977, was required to make "specific findings" regarding the presumption of soundness. (App. Br. at 12 (citing *Joyce v. Nicholson*, 19 Vet.App. 36, 46 (2005))). He misunderstands the Court's holding and mistakes the Court's discussion of the presumption of aggravation from its discussion of the presumption of soundness. In *Joyce*, the Court held that the RO had a requirement to make "specific findings," but did so only in the context of its discussion of the presumption of aggravation, as opposed to the presumption of soundness. *Joyce*, 19 Vet.App. at 50-52. This is because, as the Court explained in its opinion, the "specific finding" requirement is found in the plain language of the presumption-of-aggravation law, which is now codified at 38 U.S.C. § 1153, and its implementing regulation, 38 C.F.R. § 3.306(a). *Joyce*, 19 Vet.App. at 51. There is no "specific finding" requirement applicable to the presumption of soundness and the Court in *Joyce* did not create one.

In fact, the Court in *Joyce* expressly endorsed the opposite. First, with respect to the pre-existing prong of the presumption of soundness, the Court held that it could not conclude that it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law for the Board to determine that there was

clear and unmistakable evidence, at the time of a 1955 RO decision, that a veteran's ulcer preexisted service, "notwithstanding that the RO did not expressly so state." 19 Vet.App. at 47. Similarly, the Court reached the same conclusion when reviewing the Board's decision with respect to the aggravation prong of the presumption of soundness, reasoning that the RO "may have based its determination of nonaggravation on an ***implicit*** finding, by clear and unmistakable evidence, of natural progression by the Medical Board." *Id*. at 49-50 (emphasis in original).

In Appellant's case, the Board found that there was sufficient evidence before the RO in 1977 to conclude that Appellant clearly and unmistakably had a psychiatric disorder that pre-existed service, and that there was clear and unmistakable evidence that the pre-existing condition was not aggravated during service. (R. at 20). Because the RO, in 1977, was not required to provide a statement of reasons or bases for its decision, to establish CUE based on the purported failure to consider a particular fact or law, it must be clear from the face of that decision that a particular fact or law had not been considered in the RO's adjudication of the case. *Evans*, 27 Vet.App. at 188-89. Based upon that standard, Appellant fails to demonstrate that the Board's decision was arbitrary, capricious, an abuse of its discretion, or otherwise not in accordance with law. The 1977 RO explained to Appellant that the evidence had to show that his disability was incurred in or aggravated by service, confirming that the RO was aware that compensation could be awarded for in-service aggravation of a pre-

existing condition. (R. at 3062). The RO explained that the evidence showed that he experienced episodes of a nervous condition prior to service, confirming that it felt the condition existed prior to service. (R. at 3062). There was evidence before the RO in 1977 that the RO could have found to constitute clear and unmistakable evidence of no in-service aggravation. For example, Appellant's profile for "S" was "1" on both entrance and separation. (R. at 1628 (1627), 1653 (1652-53)). Also, the fact that Appellant's mental condition required medical treatment on two occasions prior to service is evidence that could have supported a finding of no in-service aggravation. (R. at 1635-36).

The Secretary recognizes that in *Joyce*, the Court held that the veteran's in-service increase in his pre-existing disability triggered the presumption of aggravation, despite the fact that the condition at issue was ***not noted*** upon entry. *See Joyce*, 19 Vet.App. at 37 ("During his pre-enlistment medical examination, [the appellant] was found to be without conditions that would disqualify him from service."), 50 (holding that the presumption of aggravation was triggered in that case). Subsequent case law, however, confirms that, where the presumption of soundness applies (because the condition at issue was ***not*** noted upon entry), the presumption of aggravation does not apply, even if the presumption of soundness is rebutted upon application of the two-prong test. *See Horn*, 25 Vet.App. at 238 (holding that the statutory presumption of aggravation and its implementing regulation "apply to only one situation: where the induction examination notes a preexisting condition that is alleged to have been

aggravated"). However, even assuming the presumption of aggravation could be applicable here, where no mental health condition was noted upon entry, Appellant fails to demonstrate an error in the Board's analysis. The Board here found that there was sufficient evidence before the RO in 1977 to conclude, by clear and unmistakable evidence, that the pre-existing condition was not aggravated by service. (R. at 24). Even if the presumption of aggravation could have applied in 1977, despite the fact that no mental health condition was noted upon entry, for the presumption to have been triggered, Appellant was required to furnish evidence of an in-service worsening of his pre-existing condition. *Horn*, 25 Vet.App. at 235 n.6. Because the Board found that there was sufficient evidence before the RO in 1977 to conclude, by clear and unmistakable evidence, that the pre-existing condition was not aggravated by service, the presumption of aggravation was never triggered, which again, could not have happened even if there was an in-service aggravation. *Horn*, 25 Vet.App. at 238.

Appellant also argues, in two portions of his brief, that the Board erroneously presumed that the 1977 rating decision was valid. (App. Br. at 10-11, 14-15). In one portion of his brief, he argues that the Board mischaracterized the Federal Circuit's opinion in *Natali* when it found that RO decisions prior to February 1990 were presumptively valid. (App. Br. at 11 (citing R. at 17)); *see also Natali v. Principi*, 373 F.3d 1375, 1380 (Fed. Cir. 2004). To prove his point, he quotes a portion of the Federal Circuit's opinion where it stated that, because a VA RO in 1945 was not required to set forth in detail the factual bases for its

decisions, the RO was presumed to have made the requisite findings in the absence of evidence to the contrary. (App. Br. at 11 (citing *Natali*, 375 F.3d at 1380)). He argues that contrary to how the Board characterized this opinion, the Federal Circuit did not hold that RO decisions were presumptively valid. (App. Br. at 11).

What he fails to acknowledge, though, is that immediately following the portion of the Federal Circuit's opinion that he cites in his brief, the Federal Circuit acknowledged that its own case law provides that a "presumption of validity" attaches to final RO decisions. *Natali*, 375 F.3d at 1380 (citing *Pierce v. Principi*, 240 F.3d, 1348, 1355 (Fed. Cir. 2001)). This Court has repeatedly acknowledged the validity of this rule of law. *See, e.g., King*, 26 Vet.App. at 437 ("A final decision is entitled to a strong presumption of validity.") (citation omitted); *Joyce*, 19 Vet.App. at 46. To whatever extent Appellant argues that the Board misinterpreted the law when it stated that the final 1977 rating decision was presumed to be valid, Appellant's argument must be rejected, as it is belied by the very legal authority he cites in support of it. (R. at 17).

Along the same lines, Appellant appears to argue that the RO committed CUE in its in 1977 decision when it concluded that Appellant's in-service "diagnosis" of "character/behavior disorder" was not a disability under the law. (R. at 1116, 3063); *see also* (R. at 1158 (1157-58); (App. Br. at 14-15)). He argues that the Board, in its decision on appeal here, "concedes that the July 1977 rating decisions contains clear error on that point." (App. Br. at 15). The

Court should reject this argument because it fails to demonstrate that the Board's review of the 1977 rating decision was arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law.

First, the Board made no such concession. The portion of the Board's decision that Appellant cites as purportedly making this "concession" is the Board's discussion of the 1977 RO's statement that Appellant had no complaints or any indication of a mental disorder *at the time of his discharge.* (R. at 24); *see also* (R. at 1116, 3063). That, the Board explained, was clearly erroneous because, although there were no objective findings of a mental disorder shown at his separation examination in December 1974, Appellant reported at that time that he then, or at some time in the past, experienced weight gain or loss, frequent trouble sleeping, and depression or excessive worry. (R. at 24); *see also* (R. at 1171 (1171-72)). The Board said nothing of the RO's finding that Appellant's "character/behavior disorder" was not a disability under the law, and to the extent Appellant suggests otherwise, he offers an untenable reading of the Board's decision.

As for the substance of his argument, the Court should summarily dismiss it because it does not appear that he raised this particular theory of CUE to the Board. In his CUE motion, which an attorney filed on his behalf, he argued that the 1977 RO failed to consider or discuss the presumptions of soundness and aggravation. (R. at 2557). He did not argue that the RO committed CUE when it found that his in-service "character/behavior disorder" was not a disability under

the law. (R. at 2556-61). In fact, he failed to raise that argument in either of the two joint motions for remand that he, through counsel, filed with this Court. (R. at 1762-66, 1972-79). Movants challenging final decisions on grounds of CUE must plead their cases to the agency with specificity. *Acciola v. Peake*, 22 Vet.App. 320, 325 (2008). VA cannot supply a CUE theory that has not been specifically pled. *Id.* at 326. When an appellant raises a new CUE theory for the first time to the Court, the Court must dismiss for lack of jurisdiction. *Id.* at 325. Given that it does not appear that Appellant raised this theory of CUE to the agency on any occasion during the eight years in which he sought reversal of the 1977 decision, despite being representing by an attorney and having negotiated two joint motions for remand in this Court, the Secretary asks the Court to summarily reject this argument accordingly. (*See* App. Br. at 1-15); *see also Carter v. Shinseki*, 26 Vet.App. 534, 542-43 (2014) (holding that the terms of a joint motion for remand are a factor for consideration as to whether or to what extent other issues raised by the record need to be addressed), *overruled on other grounds by Carter v. McDonald*, 794 F.3d 1342 (Fed. Cir. 2015); *Acciola*, 22 Vet.App. at 325.

B. The Board committed no post-hoc rationalization, but rather, reviewed the evidence of record before the RO in 1977 and concluded that the evidence supported the RO's decision.

Appellant's next argument concerns the Board's finding that there was sufficient evidence before the RO in 1977 from which the RO could conclude that Appellant clearly and unmistakably had a pre-existing psychiatric disorder, even

without having a medical opinion addressing the issue. (App. Br. at 17); (R. at 20). He argues that the Board based this decision "principally upon the *existence* of a regulation," but without identifying any evidence in the record. (App. Br. at 17). The regulation that the Board cited provided, in pertinent part, the following:

> Preservice disabilities noted in service. There are medical principles so universally recognized as to constitute fact (clear and unmistakable proof), and when in accordance with these principles existence of a disability prior to service is established, no additional or confirmatory evidence is necessary. Consequently with notation or discovery during service of such residual conditions . . . with no evidence of the pertinent antecedent active disease or injury during service the conclusion must be that they preexisted service. . . . In the field of mental disorders, personality disorders which are characterized by developmental defects or pathological trends in the personality structure manifested by a lifelong pattern of action or behavior, chronic psychoneurosis of long duration or other psychiatric symptomatology shown to have existed prior to service with the same manifestations during service, which were the basis of the service diagnosis, will be accepted as showing preservice origin. Congenital or developmental defects, refractive error of the eye, personality disorders and mental deficiency as such are not diseases or injuries within the meaning of applicable legislation.

38 C.F.R. § 3.303(c) (1977).

Contrary to Appellant's argument, the Board did not rely solely on the existence of that regulation to support is decision. (App. Br. at 17). The Board relied on both the May 1, 1973, chronological record of medical care, which showed that Appellant had two "nervous breakdowns" *prior to* service, for which he was treated by a physician, and § 3.303(c) to conclude that there was sufficient evidence before the RO to conclude that Appellant's mental health disability pre-existed service. (R. at 19, 1157-58). That is, the Board concluded that, based upon the evidence before the RO in 1977 and the law in effect at that

time, no additional medical evidence was needed to support the 1977 RO's decision. The Board's conclusion was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In fact, in 1977, the RO was permitted to reject medical evidence based on its own medical judgment, and indeed, the 1977 RO decision reflects that a doctor participated in rendering that decision. (R. at 1117, 3064). *Cf. Bowyer v. Brown*, 7 Vet.App. 549, 553 (1995) (acknowledging that it was not until the Court denounced the practice of the Board using its own medical judgment provided by a medical member of the panel in *Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991), that the practice became prohibited). Because final decisions are reviewed for CUE based upon the law and evidence that existed at the time of the decision, and because the Board reviewed the 1977 decision by employing that principle, Appellant's "post-hoc rationalization" argument rings hollow. (R. at 8, 10, 15, 17-20).

V. CONCLUSION

Appellant fails to demonstrate that the Board's finding that there was no CUE in the RO's 1977 decision was arbitrary, capricious, an abuse of its discretion, or otherwise not in accordance with law. The Court should affirm the Board's decision.

Respectfully submitted,

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§ 353. Aggravation

A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1124.)

§ 354. Consideration to be accorded time, place and circumstances of service

(a) The Administrator shall include in the regulations pertaining to service-connection of disabilities, additional provisions in effect requiring that in each case where a veteran is seeking service-connection for any disability due consideration shall be given to the places, types, and circumstances of such veteran's service as shown by such veteran's service record, the official history of each organization in which such veteran served, his medical records, and all pertinent medical and lay evidence.

(b) In the case of any veteran who engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, the Administrator shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran. Service-connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary. The reasons for granting or denying service-connection in each case shall be recorded in full.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1124; Pub. L. 94-433, title IV, § 404(20), Sept. 30, 1976, 90 Stat. 1379.)

AMENDMENTS

1976—Subsec. (a). Pub. L. 94-433 substituted "such veteran's" for "his" in two instances and "such veteran" for "he".

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-433 effective Oct. 1, 1976, see section 406 of Pub. L. 94-433, set out as an Effective Date of 1976 Amendment note under section 301 of this title.

§ 355. Authority for schedule for rating disabilities

The Administrator shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations. The schedule shall be constructed so as to provide ten grades of disability and no more, upon which payments of compensation shall be based, namely, 10 per centum, 20 per centum, 30 per centum, 40 per centum, 50 per centum, 60 per centum, 70 per centum, 80 per centum, 90 per centum, and total, 100 per centum. The Administrator shall from time to time readjust this schedule of ratings in accordance with experience.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1125.)

[§ 356. Repealed. Pub. L. 90-493, § 4(a), Aug. 19, 1968, 82 Stat. 809]

Section, Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1125, provided for a minimum rating for veterans with arrested tuberculosis.

EFFECTIVE DATE OF REPEAL

Section 4(b) of Pub. L. 90-493 provided that: "The repeals made by subsection (a) of this section [repealing this section and subsec. (q) of section 314 of this title] shall not apply in the case of any veteran who, on the date of enactment of this Act [Aug. 19, 1968], was receiving or entitled to receive compensation for tuberculosis which in the judgment of the Administrator had reached a condition of complete arrest."

§ 357. Combination of certain ratings

The Administrator shall provide for the combination of ratings and pay compensation at the rates prescribed in subchapter II of this chapter to those veterans who served during a period of war and during any other time, who have suffered disability in line of duty in each period of service.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1125.)

§ 358. Disappearance

Where a veteran receiving compensation under this chapter disappears, the Administrator may pay the compensation otherwise payable to the veteran to such veteran's spouse, children, and parents. Payments made to such veteran's spouse, child, or parent under the preceding sentence shall not exceed the amounts payable to each if the veteran had died from service-connected disability.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1125; Pub. L. 86-212, Sept. 1, 1959, 73 Stat. 436; Pub. L. 94-433, title IV, § 404(21), Sept. 30, 1976, 90 Stat. 1379.)

AMENDMENTS

1976—Pub. L. 94-433 deleted ", in his discretion," following "Administrator" and substituted "such veteran's spouse" for "his wife" and "such spouse" for "a wife".

1959—Pub. L. 86-212 substituted "a veteran" for "an incompetent veteran".

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-433 effective Oct. 1, 1976, see section 406 of Pub. L. 94-433, set out as an Effective Date of 1976 Amendment note under section 301 of this title.

§ 359. Protection of service connection

Service connection for any disability or death granted under this title which has been in force for ten or more years shall not be severed on or after January 1, 1962, except upon a showing that the original grant of service connection was based on fraud or it is clearly shown from military records that the person concerned did not have the requisite service or character of discharge. The mentioned period shall be com-

puted from the date determined by the Administrator as the date on which the status commenced for rating purposes.

(Added Pub. L. 86-501, § 1, June 10, 1960, 74 Stat. 195, and amended Pub. L. 87-825, § 6, Oct. 15, 1962, 76 Stat. 950.)

AMENDMENTS

1962—Pub. L. 87-825 provided for computation of the period from the date the administrator determines as the date the status commenced for rating purposes.

EFFECTIVE DATE OF 1962 AMENDMENT

Amendment by Pub. L. 87-825 effective on the first day of the second calendar month which begins after Oct. 15, 1962, see section 7 of Pub. L. 87-825, set out as an Effective Date of 1962 Amendment note under section 110 of this title.

§ 360. Special consideration for certain cases of blindness or bilateral kidney involvement or bilateral deafness

Where any veteran has suffered (1) blindness in one eye as a result of service-connected disability and has suffered blindness in the other eye as a result of non-service-connected disability not the result of such veteran's own willful misconduct, or (2) has suffered the loss or loss of use of one kidney as a result of service-connected disability, and has suffered severe involvement of the other kidney such as to cause total disability, as a result of non-service-connected disability not the result of such veteran's own willful misconduct, or (3) has suffered total deafness in one ear as a result of service-connected disability and has suffered total deafness in the other ear as the result of non-service-connected disability not the result of such veteran's own willful misconduct, the Administrator shall assign and pay to the veteran concerned the applicable rate of compensation under this chapter as if such veteran's blindness in both eyes or such bilateral kidney involvement were the result of service-connected disability.

(Added Pub. L. 87-610, § 1, Aug. 28, 1962, 76 Stat. 406, and amended Pub. L. 89-311, § 3 (a), (b), Oct. 31, 1965, 79 Stat. 1155; Pub. L. 94-433, title IV, § 404(22), Sept. 30, 1976, 90 Stat. 1379.)

AMENDMENTS

1976—Pub. L. 94-433 substituted "such veteran's" for "his" wherever appearing.

1965—Pub. L. 89-311 added clause (3) referring to total deafness in one ear as a result of service-connected disability and total deafness in the other ear as the result of non-service-connected disability not the result of his own willful misconduct, inserted reference to total deafness in both ears and, in the section catchline, inserted reference to bilateral deafness.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-433 effective Oct. 1, 1976, see section 406 of Pub. L. 94-433, set out as an Effective Date of 1976 Amendment note under section 301 of this title.

EFFECTIVE DATE OF 1965 AMENDMENT

Amendment by Pub. L. 89-311 effective on the first day of the second calendar month following the date of enactment of Pub. L. 89-311, which was approved on Oct. 31, 1965, see section 9 of Pub. L. 89-311, set out as an Effective Date of 1965 Amendment note under section 314 of this title.

§ 361. Payment of disability compensation in disability severance cases

The deduction of disability severance pay from disability compensation, as required by section 1212(c) of title 10, United States Code, shall be made at a monthly rate not in excess of the rate of compensation to which the former member would be entitled based on the degree of such former member's disability as determined on the initial Veterans' Administration rating.

(Added Pub. L. 91-241, May 7, 1970, 84 Stat. 203, and amended Pub. L. 94-433, title IV, § 404(23), Sept. 30, 1976, 90 Stat. 1379.)

AMENDMENTS

1976—Pub. L. 94-433 substituted "such former member's" for "his".

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-433 effective Oct. 1, 1976, see section 406 of Pub. L. 94-433, set out as an Effective Date of 1976 Amendment note under section 301 of this title.

§ 362. Clothing allowance

The Administrator under regulations which the Administrator shall prescribe, shall pay a clothing allowance of $190 per year to each veteran who because of disability which is compensable under the provisions of this chapter, wears or uses prosthetic or orthopedic appliance or appliances (including a wheelchair) which the Administrator determines tends to wear out or tear the clothing of such a veteran.

(Added Pub. L. 92-328, title I, § 103(a), June 30, 1972, 86 Stat. 394, and amended Pub. L. 94-71, title I, § 103, Aug. 5, 1975, 89 Stat. 396; Pub. L. 94-433, title III, § 301, title IV, § 404(24), Sept. 30, 1976, 90 Stat. 1377, 1379.)

AMENDMENTS

1976—Pub. L. 94-433, §§ 301, 404(24), substituted $190 for $175 and "the Administrator shall prescribe" for "he shall prescribe".

1975—Pub. L. 94-71 substituted $175 for $150.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-433 effective Oct. 1, 1976, see section 406 of Pub. L. 94-433, set out as an Effective Date of 1976 Amendment note under section 301 of this title.

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 94-71 effective Aug. 1, 1975, see section 301 of Pub. L. 94-71, set out as an Effective Date of 1975 Amendment note under section 314 of this title.

EFFECTIVE DATE

Section effective on the first day of the second calendar month which begins after June 30, 1972, see section 301(a) of Pub. L. 92-328, set out as an Effective Date of 1972 Amendment note under section 314 of this title.

CHAPTER 13—DEPENDENCY AND INDEMNITY COMPENSATION FOR SERVICE-CONNECTED DEATHS

SUBCHAPTER I—GENERAL

Code of Federal Regulations

38

Pensions, Bonuses, and Veterans' Relief

Revised as of July 1, 1977

CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF JULY 1, 1977

With Ancillaries

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the Office of the Federal Register
National Archives and Records Service
General Services Administration

as a Special Edition of
the Federal Register

of mental unsoundness where Veterans Administration criteria do not otherwise warrant contrary findings.

(2) In all instances any reasonable doubt should be resolved favorably to support a finding of service connection (see § 3.102).

[28 FR 183, Jan. 8, 1963]

CROSS REFERENCE: Cause of death. See § 3.312.

RATINGS AND EVALUATIONS; SERVICE CONNECTION

§ 3.303 Principles relating to service connection.

(a) *General.* Service connection connotes many factors but basically it means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein. This may be accomplished by affirmatively showing inception or aggravation during service or through the application of statutory presumptions. Each disabling condition shown by a veteran's service records, or for which he seeks a service connection must be considered on the basis of the places, types and circumstances of his service as shown by service records, the official history of each organization in which he served, his medical records and all pertinent medical and lay evidence. Determinations as to service connection will be based on review of the entire evidence of record, with due consideration to the policy of the Veterans Administration to administer the law under a broad and liberal interpretation consistent with the facts in each individual case.

(b) *Chronicity and continuity.* With chronic disease shown as such in service (or within the presumptive period under § 3.307) so as to permit a finding of service connection, subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes. This rule does not mean that any manifestation of joint pain, any abnormality of heart action or heart sounds, any urinary findings of casts, or any cough, in service will permit service connection of arthritis, disease of the heart, nephritis, or pulmonary disease, first shown as a clearcut clinical entity, at some later date. For the showing of chronic disease in service there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diaguosis including the word "Chronic." When the disease identity is established (leprosy, tuberculosis, multiple sclerosis, etc.), there is no requirement of evidentiary showing of continuity. Continuity of symptomatology is required only where the condition noted during service (or in the presumptive period) is not, in fact, shown to be chronic or where the diagnosis of chronicity may be legitimately questioned. When the fact of chronicity in service is not adequately supported, then a showing of continuity after discharge is required to support the claim.

(c) *Preservice disabilities noted in service.* There are medical principles so universally recognized as to constitute fact (clear and unmistakable proof), and when in accordance with these principles existence of a disability prior to service is established, no additional or confirmatory evidence is necessary. Consequently with notation or discovery during service of such residual conditions (scars; fibrosis of the lungs; atrophies following disease of the central or peripheral nervous system; healed fractures; absent, displaced or resected parts of organs; supernumerary parts; congenital malformations or hemorrhoidal tags or tabs, etc.) with no evidence of the pertinent antecedent active disease or injury during service the conclusion must be that they preexisted service. Similarly, manifestation of lesions or symptoms of chronic disease from date of enlistment, or so close thereto that the disease could not have originated in so short a period will establish preservice existence thereof. Conditions of an infectious nature are to be considered with regard to the circumstances of the infection and if manifested in less than the respective incubation periods after reporting for duty, they will be

held to have preexisted service. In the field of mental disorders, personality disorders which are characterized by developmental defects or pathological trends in the personality structure manifested by a lifelong pattern of action or behavior, chronic psychoneurosis of long duration or other psychiatric symptomatology shown to have existed prior to service with the same manifestations during service, which were the basis of the service diagnosis, will be accepted as showing preservice origin. Congenital or developmental defects, refractive error of the eye, personality disorders and mental deficiency as such are not diseases or injuries within the meaning of applicable legislation.

(d) *Postservice initial diagnosis of disease.* Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. Presumptive periods are not intended to limit service connection to diseases so diagnosed when the evidence warrants direct service connection. The presumptive provisions of the statute and Veterans Administration regnlations implementing them are intended as liberalizations applicable when the evidence would not warrant service connection without their aid.

[26 FR 1579, Feb. 24, 1961]

§ 3.304 Direct service connection; wartime and peacetime.

(a) *General.* The basic considerations relating to service connection are stated in § 3.303. The criteria in this section apply only to disabilities which may have resulted from service in a period of war or service rendered on or after January 1, 1947.

(b) *Presumption of soundness.* The veteran will be considered to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities, or disorders noted at entrance into service, or where clear and unmistakable (obvious or manifest) evidence demonstrates that an injury or disease existed prior thereto. Only such conditions as are recorded in examination reports are to be considered as noted (38 U.S.C. 311; Public Law 89-358).

(1) History of preservice existence of conditions recorded at the time of examination does not constitute a notation of such conditions but will be considered together with all other material evidence in determinations as to inception. Determinations should not be based on medical judgment alone as distinguished from accepted medical principles, or on history along without regard to clinical factors pertinent to the basic character, origin and development of such injury or disease. They should be based on thorough analysis of the evidentiary showing and careful correlation of all material facts, with due regard to accepted medical principles pertaining to the history, manifestations, clinical course, and character of the particular injury or disease or residuals thereof.

(2) History conforming to accepted medical principles should be given due consideration, in conjunction with basic clinical data, and be accorded probative value consistent with accepted medical and evidentiary principles in relation to value consistent with accepted medical evidence relating to incurrence, symptoms and course of the injury or disease, including official and other records made prior to, during or subsequent to service, together with all other lay and medical evidence concerning the inception, development and manifestations of the particular condition will be taken into full account.

(3) Signed statements of veterans relating to the origin, or incurrence of any disease or injury made in service if against his or her own interest is of no force and effect if other data do not establish the fact. Other evidence will be considered as though such statement were not of record. (10 U.S.C. 1219)

(c) *Development.* The development of evidence in connection with claims for service connection will be accomplished when deemed necessary but it should not be undertaken when evidence present is sufficient for this determination. In initially rating disability of record at the time of discharge, the records of the service department, including the reports of examination

at enlistment and the clinical records during service, will ordinarily suffice. Rating of combat injuries or other conditions which obviously had their inception in service may be accomplished pending receipt of copy of the examination at enlistment and all other service records.

(d) *Combat.* Satisfactory lay or other evidence that an injury or disease was incurred or aggravated in combat will be accepted as sufficient proof of service connection if the evidence is consistent with the circumstances, conditions or hardships of such service even though there is no official record of such incurrence or aggravation. (38 U.S.C. 354(b))

(e) *Prisoners of war.* Where disability compensation is claimed by a former prisoner of war, omission of history or findings from clinical records made upon repatriation is not determinative of service connection, particularly if evidence of comrades in support of the incurrence of the disability during confinement is available. Special attention will be given to any disability first reported after discharge, especially if poorly defined and not obviously of intercurrent origin. The circumstances attendant upon the individual veteran's confinement and the duration thereof will be associated with pertinent medical principles in determining whether disability manifested subsequent to service is etiologically related to the prisoner of war experience.

[26 FR 1580, Feb. 24, 1961, as amended at 31 FR 4680, Mar. 19, 1966; 39 FR 34530, Sept. 26, 1974]

§ 3.305 Direct service connection; peacetime service before January 1, 1947.

(a) *General.* The basic considerations relating to service connection are stated in § 3.303. The criteria in this section apply only to disabilities which may have resulted from service other than in a period of war before January 1, 1947.

(b) *Presumption of soundness.* A peacetime veteran who has had active, continuous service of 6 months or more will be considered to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities or disorders noted at the time thereof, or where evidence or medical judgment, as distinguished from medical fact and principles, establishes that an injury or disease preexisted service. Any evidence acceptable as competent to indicate the time of existence or inception of the condition may be considered. Determinations based on medical judgment will take cognizance of the time of inception or manifestation of disease or injury following entrance into service, as shown by proper service authorities in service records, entries or reports. Such records will be accorded reasonable weight in consideration of other evidence and sound medical reasoning. Opinions may be solicited from Veterans Administration medical authorities when considered necessary.

(c) *Campaigns and expeditions.* In considering claims of veterans who engaged in combat during campaigns or expeditions satisfactory lay or other evidence of incurrence or aggravation in such combat of an injury or disease, if consistent with the circumstances, conditions or hardships of such service will be accepted as sufficient proof of service connection, even when there is no official record of incurrence or aggravation. Service connection for such injury or disease may be rebutted by clear and convincing evidence to the contrary.

[26 FR 1580, Feb. 24, 1961, as amended at 28 FR 3088, Mar. 29, 1963; 39 FR 34530, Sept. 26, 1974]

§ 3.306 Aggravation of preservice disability.

(a) *General.* A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease. (38 U.S.C. 353)

(b) *War service.* Clear and unmistakable evidence (obvious or manifest) is required to rebut the presumption of aggravation where the preservice disability underwent an increase in severity during service. This includes medical facts and principles which may be considered to determine whether the increase is due to the natural progress

of the condition. Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of the disability prior to, during and subsequent to service.

(1) The usual effects of medical and surgical treatment in service, having the effect of ameliorating disease or other conditions incurred before enlistment, including postoperative scars, absent or poorly functioning parts or organs, will not be considered service connected unless the disease or injury is otherwise aggravated by service.

(2) Due regard will be given the places, types, and circumstances of service and particular consideration will be accorded combat duty and other hardships of service. The development of symptomatic manifestations of a preexisting disease or injury during or proximately following action with the enemy or following a status as a prisoner of war will establish aggravation of a disability. (38 U.S.C. 354)

(c) *Peacetime service.* The specific finding requirement that an increase in disability is due to the natural progress of the condition will be met when the available evidence of a nature generally acceptable as competent shows that the increase in severity of a disease or injury or acceleration in progress was that normally to be expected by reason of the inherent character of the condition, aside from any extraneous or contributing cause or influence peculiar to military service. Consideration will be given to the circumstances, conditions, and hardships of service.

[26 FR 1580, Feb. 24, 1961]

§ 3.307 Presumptive service connection for chronic, tropical or prisoner of war related disease; wartime and service on or after January 1, 1947.

(a) *General.* A chronic, tropical or prisoner of war related disease listed in § 3.309 will be considered to have been incurred in service under the circumstances outlined in this section even though there is no evidence of such disease during the period of service. No condition other than one listed in § 3.309(a) will be considered chronic.

(1) *Service.* The veteran must have served 90 days or more during a war period or after December 31, 1946. The requirement of 90 days' service means active, continuous service within or extending into or beyond a war period, or which began before and extended beyond December 31, 1946, or began after that date. Any period of service is sufficient for the purpose of establishing the presumptive service connection of a specified disease under the conditions listed in § 3.309(c).

(2) *Separation from service.* For the purpose of paragraph (a) (3), (4) and (5) of this section the date of separation from wartime service will be the date of discharge or release during a war period, or if service continued after the war, the end of the war period. In claims based on service on or after January 1, 1947, the date of separation will be the date of discharge or release from the period of service on which the claim is based.

(3) *Chronic disease.* The disease must have become manifest to a degree of 10 percent or more within 1 year (for Hansen's disease (leprosy) and tuberculosis, within 3 years; multiple sclerosis, within 7 years) from the date of separation from service as specified in paragraph (a)(2) of this section.

(4) *Tropical disease.* The disease must have become manifest to a degree of 10 percent or more within 1 year from date of separation from service as specified in paragraph (a)(2) of this section, or at a time when standard accepted treatises indicate that the incubation period commenced during such service. The resultant disorders or diseases originating because of therapy administered in connection with a tropical disease or as a preventative may also be service connected. (38 U.S.C. 312)

(5) *Diseases specific as to prisoners of war.* The disease must have become manifest to a degree of 10 percent or more at any time after service, except psychosis which must have become manifest to a degree of 10 percent within 2 years from the date of separation from service as specified in para-